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Nos. 01-1020, 01-1155, 01-1398 and 01-1411

# In the Supreme Court of the United States

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
PETITIONER

*v.*

UNITED STATES OF AMERICA

MAINE YANKEE ATOMIC POWER COMPANY,
PETITIONER

*v.*

UNITED STATES OF AMERICA

OMAHA PUBLIC POWER DISTRICT, PETITIONER

*v.*

UNITED STATES OF AMERICA

COMMONWEALTH EDISON COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

In order to provide some of the funds necessary to decontaminate the Department of Energy's uranium enrichment facilities, Congress imposed a special assessment on those domestic nuclear utilities that had purchased, either from the Department of Energy directly or in the secondary market, uranium that had been enriched at those facilities. See 42 U.S.C. 2297; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). The questions presented are:

1. Whether the special statutory decontamination assessment constitutes an unlawful breach of the contracts for uranium enrichment services between petitioners and the Department of Energy.

2. Whether the special decontamination assessment constitutes an impermissible taking of petitioners' property without just compensation.

3. Whether the special decontamination assessment is unconstitutionally retroactive, in violation of petitioners' substantive due process rights.

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## OPINIONS BELOW

The decision of the en banc court of appeals in *Commonwealth Edison* (SMUD Pet. App. 17a-68a; Com Ed Pet.

App. 1a-52a)[1] is reported at 271 F.3d 1327. The decision of the Court of Federal Claims in *Commonwealth Edison* (Com Ed Pet. App. 85a-120a) is reported at 46 Fed. Cl. 29.

The consolidated decision of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* (SMUD Pet. App. 1a-16a) is reported at 271 F.3d 1357. The decision of the Court of Federal Claims in *Sacramento Municipal* (SMUD Pet. App. 69a-91a) is reported at 44 Fed. Cl. 395. The decision of the Court of Federal Claims in *Maine Yankee* (MYAP Pet. App. 17a-39a) is reported at 44 Fed. Cl. 372. The decision of the Court of Federal Claims in *Omaha Power* (OPPD Pet. App. 17a-39a) is reported at 44 Fed. Cl. 383.

## JURISDICTION

The judgment of the en banc court of appeals in *Commonwealth Edison* was entered on November 20, 2001. On February 12, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari in that case to and including March 20, 2002, and the petition was filed on that date.

The judgment of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* was entered on November 20, 2001. Sacramento Municipal Utility District's petition for a writ of certiorari in No. 01-1020 was filed on January 10, 2002. Maine Yankee Atomic Power Company's petition in No. 01-1155 was filed on February 8, 2002. On February 13, 2002, the Chief Justice extended the time for filing a certiorari petition for Omaha Public Power District to and including March 20, 2002, and the petition in No. 01-1398 was filed on that date.

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[1] References in this brief to "SMUD Pet." are to the petition in No. 01-1020; to "MYAP Pet." are to the petition in No. 01-1155; to "OPPD Pet." are to the petition in No. 01-1398; and to "Com Ed Pet." are to the petition in No. 01-1411.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1992, Congress enacted the Energy Policy Act (EPACT), Pub. L. No. 102-486, 106 Stat. 2276, which was intended to establish a "comprehensive national energy policy" addressing, among other things, "solutions to our nuclear waste and uranium enrichment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was contamination at the Department of Energy's (DOE's) uranium enrichment facilities. The government had conducted uranium enrichment at those facilities since the 1940s, and since the 1960s had offered commercial uranium enrichment services to utility companies for use in power generation. See SMUD Pet. App. 20a.[2]

Typically, DOE offered uranium enrichment to utilities under an arrangement by which the purchasers furnished low-grade uranium to the Department, DOE processed the uranium, and DOE then returned the enriched uranium to the utilities. The enrichment services were measured in terms of "separative work units" (SWUs). Utilities were typically charged the product of the number of SWUs they received, multiplied by the unit price in the contract. The unit pricing varied somewhat from contract to contract, but generally the unit price was established by reference to the price in effect at the time the service was rendered, and in some cases was also capped by contract at a maximum price. SMUD Pet. App. 20a-21a.

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[2] Before the establishment of the Department of Energy, the government's uranium enrichment facilities were operated by the Atomic Energy Commission and by the Energy Research and Development Administration. See SMUD Pet. App. 20a. For simplicity, we refer in this brief to the governmental entity that conducted uranium enrichment as DOE or the Department.

Before enacting EPACT, Congress extensively considered numerous options to finance the decontamination and decommissioning of uranium enrichment facilities. Congress considered past use of the plants, the causes of the contamination, and estimates of clean-up costs. By 1992, estimates of the cost of decontamination had risen to more than $20 billion. During hearings, industry representatives, who participated actively in the framing of EPACT, acknowledged that the industry had benefited from the uranium enrichment services, and expressed the industry's willingness to pay a fair share of the cost of decontaminating the enrichment facilities. They urged Congress to adopt a compromise that capped utilities' contribution at $2.5 billion. See *Comprehensive National Energy Policy Act: Hearings on H.R. 776 Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 171, 178-182 (1992); SMUD Pet. App. 26a-30a (reviewing legislative framing of EPACT).

After debating options and weighing facts surrounding the use and contamination of the plants, Congress concluded that it was equitable for domestic utilities that had benefited from DOE's uranium enrichment services to contribute a portion of the cost of decontaminating the facilities where that enrichment was conducted. See H.R. Rep. No. 474, *supra*, Pt. 8, at 77-78; 138 Cong. Rec. 32,073 (1992) (remarks of Rep. Sharp). Congress established the Uranium Enrichment Decontamination and Decommissioning Fund (Fund) to accumulate and disburse the funds necessary to decontaminate those facilities. See 42 U.S.C. 2297g; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). Congress provided that the federal government would absorb the majority of the decontamination costs through annual appropriations to the Fund totaling $330 million (adjusted annually for inflation), or 68% of the total amount to be deposited into the Fund over 15 years. See 42 U.S.C. 2297g-1(b)(2), (c) and (d); 42 U.S.C. 2297g-1(a) (1994 & Supp. V 1999).

The remaining 32% (not to exceed $2.25 billion over 15 years) of the Fund's financial base is collected in annual installments (not to exceed $150 million per year, adjusted annually for inflation) from domestic utilities that obtained government-enriched uranium for the purpose of generating electricity. See 42 U.S.C. 2297g-1(c). Whether a utility is required to contribute to the Fund turns not on whether the utility had entered into a contract to purchase uranium from DOE, but whether the utility actually obtained the enriched uranium, and thus had benefited from DOE's enrichment services. In particular, a utility that purchased enriched uranium from DOE, but resold that uranium to another utility on the secondary market is not responsible to contribute to the Fund for the amount of uranium that it resold and did not use, whereas a utility that purchased uranium from another utility but not from DOE for its own use in power generation is responsible for contributing to the Fund in an amount proportionate to the amount of uranium that it used. See 42 U.S.C. 2297g-1(c); see also SMUD Pet. App. 25a. Utilities that are required to pay an assessment to the Fund may in turn treat that assessment as a "necessary and reasonable current cost of fuel" that is "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. After the enactment of EPACT, petitioners, as well as several other utility companies, each filed suit in the Court of Federal Claims challenging the EPACT assessments on constitutional and contract-law grounds. In 1997, a panel of the Federal Circuit, in a separate case, rejected the utilities' principal arguments based on contract law. *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998). The *Yankee Atomic* panel first noted that the disputes did not even "appear to be [cases] involving a breach of contract[,]" because, "[t]ypically, a contract breach occurs while the contract is

being performed, whereas the contracts in the present case have been fully performed by both parties." *Id.* at 1573 n.2. The court also concluded, however, that the government was not liable for breach of contract in any event based on EPACT because of the sovereign-acts and unmistakability doctrines. *Id.* at 1574. In so concluding, the court carefully examined and applied this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

Applying the sovereign-acts doctrine, the *Yankee Atomic* court ruled that passage of the EPACT assessment provision did not constitute a breach of the government's contract with the utilities because that provision was enacted not "for the purpose of retroactively increasing the price of its earlier contracts with [the utilities]," but rather "for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public)." 112 F.3d at 1575. The court stressed that the EPACT assessments fall not on the entities that contracted with DOE for enrichment services, but rather on the utilities that eventually used the enriched uranium for power generation, even if they purchased that uranium in the secondary market. *Id.* at 1574-1575.

The *Yankee Atomic* court further concluded that, under the unmistakability doctrine (under which "[a] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act," EPACT also furnished no basis for government liability to the utilities. See 112 F.3d at 1578 (quoting *Winstar*, 518 U.S. at 878 (opinion of Souter, J.)). The court noted that "application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government," and that the utilities' contracts with the government, although typi-

cally fixed-price contracts, contained no promise that "unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax." *Id.* at 1579.[3] The utility sought certiorari in *Yankee Atomic*, arguing that EPACT breached its contract with DOE, but this Court denied review, 524 U.S. 951 (1998).

3. Thereafter, these cases proceeded in the Court of Federal Claims. Each case was dismissed by that court for failure to state a claim. See SMUD Pet. App. 69a-91a; MYAP Pet. App. 17a-39a; OPPD Pet. App. 17a-39a; Com Ed Pet. App. 85a-124a.

Each petitioner appealed to the Federal Circuit. Oral arguments in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* were separately conducted on the same day before the same panel of the Federal Circuit. The separate and later appeal in *Commonwealth Edison* proceeded before a different panel of the Federal Circuit; after that panel argument, the Federal Circuit *sua sponte* ordered that *Commonwealth Edison* be heard en banc. SMUD Pet. App. 17a.

4. The en banc court affirmed the dismissal in *Commonwealth Edison*. SMUD Pet. App. 17a-68a. On the basis of the en banc court's decision in *Commonwealth Edison*, the panel hearing the appeals in the other three cases also affirmed the dismissal of those cases. *Id.* at 1a-16a.

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[3] Judge Mayer dissented from the panel's decision in *Yankee Atomic*, but he would not have ruled that EPACT constituted a breach of contract. To the contrary, he agreed with the panel majority that "[o]nce a contract is completed, the contractual relationship ends and there is no privity between the parties," and thus the utilities "cannot prevail on [the] claim that the government breached the contracts at issue years after they were finished." 112 F.3d at 1582; see also *id.* at 1584 ("But this is not a breach of contract case."). Rather, Judge Mayer argued that the EPACT assessments contravened substantive due process. See *id.* at 1585.

a. The en banc court first rejected the utilities' argument that the EPACT assessments constitute a taking of their property without just compensation. The court noted that, in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), five Justices (Justice Kennedy concurring in the judgment, and four dissenting Justices) concluded that "regulatory actions requiring the payment of money are not takings" (SMUD Pet. App. 36a)—a result in accord with the Federal Circuit's own pre-*Eastern Enterprises* precedent (*id.* at 36a-37a) as well as decisions of other circuits rendered after *Eastern Enterprises* (*id.* at 36a n.10). The court thus concluded that, "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* at 37a.

b. The court also rejected the utilities' breach of contract claims, in reliance on its previous decision in *Yankee Atomic*, *supra*. As in *Yankee Atomic*, the court ruled here that "the imposition of the special assessments [under EPACT] was a lawful exercise of Congress's taxing power under the sovereign acts doctrine," and that DOE's contracts with the utilities "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." SMUD Pet. App. 38a.

c. Finally, the court addressed at length and rejected the argument that the EPACT assessments violate substantive due process. SMUD Pet. App. 39a-67a. The court initially observed that, although the EPACT assessments are retroactive, that point by itself does not render them unconstitutional, for, as this Court has made clear, due process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 40a (citation omitted). The court found that standard satisfied in the case of EPACT, because the

assessments are based on "a congressional determination to impose liability on companies that received a benefit [the uranium enrichment services], the production of which benefit contributed to a societal problem." *Id.* at 43a.

Summarizing this Court's decisions (including *Eastern Enterprises*), the court concluded that retroactive obligations to pay money satisfy substantive due process as long as "(1) Congress reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." SMUD Pet. App. 47a. The court found the first condition "easily" satisfied, as the utilities "certainly benefited from the government's provision of enrichment services." *Ibid.* As the court noted, the utilities "could hardly have operated nuclear reactors without the benefit of uranium enrichment services from the United States government or some other approved source." *Id.* at 48a. Moreover, the processing of uranium for the utilities contributed to a societal problem by contributing "to increased costs associated with" decontamination. *Ibid.* Nor, the court ruled, were the remediation costs imposed on the utilities severely disproportionate to the benefit they received from the enrichment services; EPACT made the utilities responsible for only a third of those costs (and each utility was assessed only for the proportion of enriched uranium that it actually used), even though Congress received evidence that enriched uranium production at the DOE facilities had been divided equally between the governmental and commercial sectors. *Id.* at 49a.

The court further concluded that the EPACT assessments do not violate any reasonable expectation on the part of the utilities that, as a result of their contracts with DOE, they were entitled to immunity from any future liability for the

cost of decontamination of the DOE facilities. SMUD Pet. App. 50a-67a. The court observed that the utilities operated in a highly regulated industry where it was reasonable to "expect liability for remediation costs" (*id.* at 52a), and that the utilities were fully "aware of the hazardous nature of the materials" and that there would be a need to decontaminate the DOE facilities (*id.* at 53a).

The court also stressed that the regulatory environment at the time that utilities submitted uranium to DOE for processing placed the utilities on notice of the possible imposition of retroactive remediation liability. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, made clear that a party that arranges for the treatment or disposal of a hazardous substance may be liable for environmental damage caused by that substance, even if that party itself did not perform that treatment or disposal. See SMUD Pet. App. 56a-57a. CERCLA, in turn, is consistent with principles of common law nuisance liability and strict liability for handling of ultrahazardous materials, *id.* at 60a-62a, especially the principles set forth in the Restatement (Second) of Torts § 472b (1965), which made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." SMUD Pet. App. 61a. Thus, the court concluded, the utilities "could not have reasonably expected that Congress would not enact legislation imposing remediation costs on the utilities submitting uranium for processing." *Id.* at 62a.

## ARGUMENT

The court of appeals correctly rejected petitioners' contract-law and constitutional challenges to the special decontamination assessments imposed by EPACT. That decision also does not conflict with any decision of this Court

or any other court of appeals. Further review is therefore not warranted.

1. Petitioners renew the argument rejected by the Federal Circuit in *Yankee Atomic*, *supra*, that the EPACT assessments breached their uranium enrichment contracts with DOE by retroactively increasing the price of enrichment services. This Court denied review of the same contention in *Yankee Atomic*, see pp. 5-7, *supra*, and there is no basis in this case for a different result. Moreover, the lower courts properly rejected that contract claim.

a. First, as all members of the *Yankee Atomic* panel observed, no claim for breach of contract may be brought based on contracts that have already been fully performed. See 112 F.3d at 1573 n.2; *id.* at 1582 (Mayer, J., dissenting); see also *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987); *Mulholland* v. *United States*, 361 F.2d 237, 239-240 (Ct. Cl. 1966). Petitioners' complaints allege that, with the exception of one outstanding contract between DOE and Commonwealth Edison, the contractual relation between petitioners and the government had already terminated.[4]

Because (with the one exception) the contractual relations between the utilities and the government terminated before these actions were brought, this case does not present an appropriate occasion for the Court to examine further the sovereign-acts and unmistakability doctrines. The bulk of petitioners' contract claims could have been rejected without recourse to those doctrines, which are defenses available to the government against attempts to require the government to perform its contractual obligations, or to recover for the government's alleged breach of contractual obligations. See

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[4] See SMUD C.A. App. 24 (¶ 1); MYAP C.A. App. 35 (¶ 47), 36 (¶¶ 50-51); OPPD C.A. App. 16 (¶ 44); Com Ed C.A. App. 521 (¶ 13), 534 (¶ 45), 535 (¶ 49).

*Winstar*, 518 U.S. at 870-871 (opinion of Souter, J.); *id.* at 920-921 (Scalia, J., concurring in the judgment).

For the same reason, there is no merit to petitioner Omaha Power's argument (OPPD Pet. 21-22) that the decision below conflicts with the courts' application of the sovereign-acts doctrine in *Kimberly Associates* v. *United States*, 261 F.3d 864 (9th Cir. 2001), and *RTC* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994). In each of those decisions, the court made clear that the sovereign-acts doctrine "operates to insulate the government from liability for certain inabilities to perform contractual obligations." See *RTC*, 25 F.3d at 1501; see also *Kimberly Assocs.*, 261 F.3d at 870 (characterizing statute under consideration as "a partial repudiation by Congress of its contractual obligation to perform"). Here, however, there is no question of the government's failure to perform under its contracts with petitioners; DOE has already performed its obligations to provide enrichment services.

b. In any event, the court of appeals' application of the sovereign-acts and unmistakability doctrines was correct. The EPACT special assessment legislation is a "sovereign act." The assessments fall on the utilities that actually used the enriched uranium and thereby benefited from DOE's enrichment services, not the entities that directly purchased the uranium from DOE. Thus, EPACT cannot be viewed as a retroactive price increase of the contracts between DOE and the purchasing utilities. Rather, it is legislation designed to spread the costs of decontamination and decommissioning among the utilities that benefited from the program that caused those problems. See SMUD Pet. App. 61a; *Yankee Atomic*, 112 F.3d at 1580-1581.

Furthermore, because petitioners seek damages in the entire amount of the assessments that they are required to pay under EPACT, they effectively seek an exemption from, or an injunction against, the operation of EPACT as applied

to them. Petitioners must therefore overcome the unmistakability doctrine in its strongest form. See *Winstar*, 518 U.S. at 881-882 (opinion of Souter, J.); *id.* at 916-917 (Breyer, J., concurring); *id.* at 921 (Scalia, J., concurring in the judgment). As the Federal Circuit explained in *Yankee Atomic*, the contracts simply did not provide that the government would forego any assessments in the future on the nuclear power industry to address the cost of decontamination. See 112 F.3d at 1569. The contracts were therefore subject to subsequent legislation passed by Congress. See *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

Nor did the government agree to indemnify the utilities against the costs of regulatory changes or legislative enactments. In *Winstar*, by contrast, this Court ruled that the United States, through guarantee clauses in contracts, had undertaken to assume the risk of, and to indemnify the acquiring thrifts for, future changes in regulatory policy. See 518 U.S. at 868-869, 871, 881-883 (opinion of Souter, J.); *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). No such guarantee clauses existed in petitioners' contracts with DOE.

2. a. Petitioners argue that the financial impact of the EPACT assessments on them constitutes a taking of their property without just compensation. Petitioners' taking claim, however, must fail at threshold, for as five Justices of this Court made clear in *Eastern Enterprises*, a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not properly analyzed as a taking at all. See *Eastern Enterprises*, 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting). That point follows from the fact that, "[a]s its language indicates, * * * [the Just Compensation Clause] does not prohibit the taking of private property, but instead places a

condition on the exercise of that power." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987).[5]

The concern of the Just Compensation Clause is therefore not in *preventing* government action, but rather ensuring that compensation is paid when the government appropriates private property interests to serve the public good. *First English*, 482 U.S. at 314. Petitioners, however, challenge the constitutional validity of Congress's decision to enact the EPACT special assessments. To make a taking claim, petitioners would have to raise the highly contrived contention that Congress had impermissibly failed to offer them monetary compensation in the precise amount of the special assessment that Congress had ordered them to pay. The Court rejected a very similar contention in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), where it concluded that the government's imposition of a service fee for use of services in the U.S.-Iran Claims Tribunal, in the form of a percentage deduction from monetary awards made by the

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[5] The taking issue in this case is not distinguishable from *Eastern Enterprises* (in which five Justices found a taking analysis inapplicable) on the basis that *Eastern Enterprises* involved an obligation that one private party pay money to another private party, whereas this case involves an obligation to pay money to the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that it was wrong to conceptualize the monetary obligation in *Eastern Enterprises* as a taking was that such a characterization might well lead to the conclusion that all taxes could potentially be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Tribunal, was not a taking of property that required just compensation. As the Court explained:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. * * * If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance.

*Id.* at 62 n.9. The Court in *Sperry* also distinguished (*id.* at 62) cases such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-165 (1980), where the Court applied a taking analysis to interest generated from a specific *res*, a separately identifiable fund of money.[6]

Perhaps recognizing the force of that point, petitioner Commonwealth Edison stretches to find a specific property interest that may have been taken, suggesting (Com Ed Pet. 13) that the requisite "property" is the "stream of income" supposedly created by the passing on of the cost of the assessments to consumers of electrical power. EPACT, however, does not require the payment of the assessments out of any such "stream of income" or indeed from any particular identifiable source or fund of money. Rather, the utilities are generally liable for EPACT assessments without regard to whether the assessments are passed on to

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[6] Petitioner MYAP argues (MYAP Pet. 21) that cases such as *Webb's* are not distinguishable from this case because *Webb's* involved a taking of interest earned on a specific fund of money, not the fund itself. The Court made clear in *Webb's*, however, that it decided that case based on the common law rule that "any interest * * * follows the principal" and becomes part of the fund itself. See *Webb's*, 449 U.S. at 162; see also *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 165-168 (1998) (using same rule to analyze alleged taking of interest earned on attorney trust accounts).

consumers and without reference to the source of the funds used to pay the assessments. See *Sperry*, 493 U.S. at 62 n.9.

b. Even if a taking analysis were applicable to the EPACT assessments, they would not be invalid. A taking by regulation or legislation may occur if the government goes "too far" in interfering with rights of property ownership. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). Regulatory taking claims are generally subject to the three-part analysis set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), which takes into account (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." Those factors make clear that the EPACT assessments are not takings.[7]

First, the nature of the government's action is "critical" in determining whether a taking occurred. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488 (1987). EPACT assessments are "very similar to * * * a general tax that falls proportionately on all utilities that benefited from the DOE's uranium enrichment services." *Yankee Atomic*, 112 F.3d at 1576. This Court has stressed, however, that taxes are exactly the kind of governmental action that

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[7] The EPACT assessments cannot properly be viewed as a physical appropriation or occupation of property that this Court has characterized as a per se taking. Cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Even the four Justices who applied a taking analysis to the legislatively imposed monetary obligation at issue in *Eastern Enterprises* declined to characterize that liability as a per se taking. See *Eastern Enterprises*, 524 U.S. at 522, 530 (opinion of O'Connor, J.); see also *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, No. 00-1167 (Apr. 23, 2002), slip op. 17-28 (reaffirming limited reach of per se taking analysis to physical occupations and appropriations of property).

are least likely to be considered takings: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. *Exercises of the taxing power are one obvious example.*" *Penn Central*, 438 U.S. at 124 (emphasis added; citations omitted).

Second, the economic impact of the assessments on petitioners is proportionate to their prior experience with the uranium enrichment services that are the object of the legislation. EPACT specifically allocates liability in direct proportion to the utilities' previous use of enriched uranium. See p. 5, *supra*. In addition, EPACT moderates the impact of the assessments on petitioners by mandating that a utility "shall" be allowed to fully recover the special assessments from its ratepayers as a "necessary and reasonable current cost of fuel." 42 U.S.C. 2297g-1(g). Because the pass-through mechanism is established by federal law, state regulators are preempted from disregarding it. See, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 369-372 (1988). Thus, petitioners have a federal right to pass through the impact of the EPACT assessments to their customer base. Cf. *Eastern Enterprises*, 524 U.S. at 527, 531 (opinion of O'Connor, J.) (noting that regulated entity's ability to moderate impact of liability by passing on obligation is relevant to taking analysis, but finding no "right of reimbursement" in that case).

Finally, the assessments do not contravene any reasonable expectation on the part of petitioners that they would be immune from future governmental assessments requiring contributions to meet the costs of decontamination of the enrichment facilities. As the court of appeals explained, enriched uranium has long been known to be extremely

hazardous; it has long been understood that the enrichment process would leave a need for decontamination; and the nuclear power industry has always been strictly regulated. See SMUD Pet. App. 52a-54a. EPACT was designed "to implement solutions to our nuclear waste and uranium enrichment problems," H.R. Rep. No. 474, *supra*, Pt. 1, at 132, and a nuclear utility using enriched uranium could hardly expect to be immune from contributing to such solutions. "Those who do business in [a highly regulated field] cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

Nothing in the legislation or regulations governing the nuclear power program could have created a reasonable expectation that nuclear power companies would be exempt from future assessments for decontamination of uranium enrichment plants. To the contrary, the strict regulation of the industry put them on notice that they could be liable in the future for assessments like those at issue here. And as the court of appeals also explained in *Yankee Atomic*, 112 F.3d at 1580-1581, petitioners' contracts with DOE for uranium enrichment services also created no contract-based expectation that they would be immune from sharing in the future cost of decontamination.

c. Petitioners erroneously suggest (Com Ed Pet. 16) that the decision below, finding a taking analysis inapplicable, is contrary to decisions of other circuits that have analyzed monetary obligations to the government under the regulatory taking doctrine. In *United States* v. *Hercules, Inc.*, 247 F.3d 706 (8th Cir.), cert. denied, 122 S. Ct. 665 (2001), the court expressly *declined* to address the taking claim on the ground that the extent of the challenged monetary liability was uncertain. Although the court remarked that any taking analysis would likely be "ad hoc and fact intensive," *id.* at 722

(citing *Eastern Enterprises*, 524 U.S. at 523 (opinion of O'Connor, J.)), it did not address the logically anterior question whether the liability should be analyzed as a taking at all. In *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001), the court ruled that a retroactive adjustment to Louisiana's workers' compensation scheme was an invalid taking, but the court stressed (after considering the significance of Justice Kennedy's separate opinion in *Eastern Enterprises*) that the case before it involved the taking of "an identifiable property interest or fund," namely, a "specific fund of benefits." *Id.* at 420. That important point distinguishes that case from this one, which involves a general liability that petitioners may and must meet out of any of their assets.[8]

3. Petitioners contend that the EPACT assessment obligation violates substantive due process because of its retroactive effect. Petitioners make essentially three arguments in support of that contention. First, they argue that they had a reasonable expectation, based in their fixed-price contracts with DOE, that the costs of decontaminating the enrichment facilities would be entirely absorbed by the government. Second, they contend that the extent of the retroactivity, by itself, renders the assessments invalid. Third, they argue that they cannot be deemed responsible for the contamination because the facilities were already contaminated by the government's enrichment of uranium

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[8] In addition, the Louisiana scheme invalidated in *United States Fidelity & Guaranty* is crucially different from the EPACT assessments in that many of the workers' compensation insurance companies affected by the retroactive change in the law effectively had no way to pass on the increased assessments to any customer base in the State, for they had left the business of writing insurance in Louisiana. See 226 F.3d at 418. By contrast, petitioners have a federal right to pass on the EPACT assessments to their utility customers. See p. 17, *supra*.

for its own military needs before the government began offering commercial enrichment services to nuclear utilities. Each of those arguments is without merit.[9]

a. As this Court has made clear on numerous occasions, retroactive economic legislation enjoys a presumption of validity. See, *e.g.*, *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). That presumption of validity is not overcome merely because the law upsets "otherwise settled expectations" or imposes new liability based on past acts. *Id.* at 16. Of course, "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively," and "[t]he retro[active] aspects of legislation * * * [also] must meet the test of due process." *Id.* at 16-17. But "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose

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[9] Petitioners also argue (SMUD Pet. 23-24; MYAP Pet. 17-19) that the EPACT assessments require special scrutiny under the Due Process Clause because (petitioners maintain) they operate as taxing provisions. But as this Court explained in *United States* v. *Carlton*, 512 U.S. 26 (1994), and as the court of appeals in this case observed (SMUD Pet. App. 41a), the cases on which petitioners rely, subjecting retroactive taxes to heightened scrutiny, "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Carlton*, 512 U.S. at 34 (internal quotation marks omitted). *Carlton* made clear that the rational-basis due process test for retroactive application of taxing statutes "is the same as that generally applicable to retroactive economic legislation." *Id.* at 30. Moreover, the tax cases on which petitioners rely all involved taxes for the purposes of raising *general* revenues for the support of government. This case involves an assessment for a dedicated purpose, namely, the decontamination and decommissioning of enrichment facilities from which petitioners benefited. Thus, even if, as petitioners contend, a "wholly new tax" for the purpose of raising general revenues could not be applied retroactively, see MYAP Pet. 18, that point would not apply to an assessment, such as the EPACT assessment, that is intended and necessary to implement a specific regulatory scheme.

furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray*, 467 U.S. at 729.

It was legitimate and rational for Congress to require utilities that obtained their enriched uranium from government-operated facilities to contribute to the cost of decontaminating those facilities. The substantial cost of decontamination was not anticipated at the time the government provided those enrichment services, and Congress was not precluded from acting to spread the "actual, measurable cost of [a] business" that the utilities were able to avoid in the past. *Turner Elkhorn*, 428 U.S. at 19. "[T]he costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem," *Yankee Atomic*, 112 F.3d at 1576 n.6, and the EPACT assessment is "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government," *id.* at 1580.

Moreover, Congress understood that the utilities had received two substantial benefits (beyond just receiving the uranium itself) from the government's enrichment services. First, DOE was required to price the enrichment services on a cost-recovery basis; the program was not intended as a profit-making enterprise. See 42 U.S.C. 2201(v)(B)(iii) (1988). Thus, the utilities received below-market pricing for the services. Second, by obtaining the use of the government's enrichment facilities, utilities were able to avoid the even greater costs of building enrichment plants of their own and meeting their own decontamination costs. See 138 Cong. Rec. at 32,073 (remarks of Rep. Sharp); H.R. Rep. No. 474, *supra*, Pt. 1, at 144-145.

Petitioners in any event did not have a reasonable expectation that they would be immune from legislation requiring them to contribute to the cost of decontaminating the facilities from which they obtained their enriched uranium. Petitioners' contracts with DOE set a price for uranium enrichment services, but the contracts did not address future assessments for decontamination and decommissioning at all—much less purport to foreclose any future liability that might prove to be necessary to protect the public health and safety. There accordingly was no settled expectation to upset. See *Yankee Atomic*, 112 F.3d at 1575-1582; cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1006, 1008-1010 (1984).

Nor did the legislative and regulatory environment at the time the enrichment services were provided suggest that petitioners could escape liability for decontamination costs. To the contrary, as the court of appeals explained, based on its comprehensive review of the law of liability for hazardous substances (SMUD Pet. App. 54a-67a), it was entirely foreseeable, well before the enactment of EPACT, that the utilities would have to contribute to the decontamination of the enrichment facilities. First, CERCLA, which was enacted in 1980, and which itself operates retroactively as well as prospectively, contains a principle that one who arranges for the treatment or disposal of a hazardous substance may be liable for remediation costs, even if that party did not conduct the processing or disposal itself. See *id.* at 56a-57a.[10]

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[10] Petitioner Commonwealth Edison argues (Com Ed Pet. 21-22) that CERCLA would not support arranger liability for one in its position. It argues, for example (*id.* at 21), that only one who maintains ownership or control over the hazardous substance may be subject to arranger liability. But the arranger liability cases cited by the court of appeals (SMUD Pet. App. 56a-57a) do not turn on which party maintained technical title to the processed and disposed materials, and such an inquiry would make especially little sense in a situation like this one, where many of the customers

Second, even before CERCLA, principles of common law liability, as summarized in the Restatement (Second) of Torts § 427b (1965), made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." See SMUD Pet. App. 61a.

b. Petitioners lay great stress on the fact that EPACT has a retroactive reach of up to 33 years, as the government began offering commercial enrichment services in 1969. See Com Ed Pet. 1-2, 8, 23-24. This Court's due process decisions make clear, however, that a statute's retroactive reach is less significant than the justification for imposing retroactive liability. Indeed, the Court has upheld the retroactive application of a statute that reached back much longer than the EPACT assessments. In *Turner Elkhorn*, the Court upheld the retroactive application of the black lung benefit program, which, for benefit claims filed after July 1, 1973,

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furnished the unenriched uranium to DOE for processing and then received the enriched uranium afterwards. See Com Ed Pet. 2. The enrichment services were plainly performed with the intent that the utilities would receive the enriched uranium, even if DOE held technical title to the uranium during the enrichment process. Com Ed also argues (*id.* at 21 n.17) that recent cases have rejected CERCLA liability for "mere purchases of products." However, the case cited by Com Ed for that proposition, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000), is quite different from this case. In that case, the purchaser of services (electroplating services) furnished and received a product that was not, either before or after the electroplating, a hazardous substance. See *id.* at 1339. This case, however, involves processing of uranium, which is the quintessential ultrahazardous substance. See SMUD Pet. App. 62a. In any event, our point is not that EPACT follows every aspect of CERCLA liability, but rather that CERCLA's provision for arranger liability for processing of hazardous substances put nuclear utilities on notice that they could be required to contribute to the costs of remedying contamination caused by enrichment services that they had ordered.

made mine operators responsible for miners' black-lung benefits regardless of the date the miner left employment, see 428 U.S. at 8-10—and indeed, benefits had been awarded to miners who had left mine work as much as 50 years earlier. See *id.* at 40 n.4 (Powell, J., concurring in part and concurring in the judgment in part). Similarly, CERCLA has an unlimited retrospective reach, but no court of appeals has invalidated that statute on retroactivity grounds. See *United States* v. *Monsanto Co.*, 858 F.2d 160, 173-174 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

Rather than cut off the retroactive effect of EPACT at an arbitrary date, Congress determined that each nuclear utility's liability for the special assessments should be proportionate to the amount of enriched uranium it had actually received and retained. That approach was a fair and rational means of allocating the utilities' responsibility to contribute to decontamination costs, by which each utility's liability is correlated to the extent that it derived a benefit from the enrichment services that caused the contamination problem. The utilities are assessed only for decontamination and decommissioning costs related to the uranium enrichment program, from which they benefited, in direct proportion to their use of enrichment services. They are not assessed for unrelated costs, such as the cost of remedying general pollution.[11] Moreover, contrary to petitioners' assertion that

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[11] Petitioners argue (Com Ed Pet. 4, 17-18, 27 n.20) that Congress improperly required them to contribute to the cost of cleaning up thorium and uranium processing sites unrelated to the uranium enrichment services that they purchased from DOE. That contention is incorrect. The overall statutory scheme makes clear that Congress intended petitioners' contributions to the Fund to be applied only to cleaning up DOE's uranium enrichment facilities. EPACT provides that the utilities' special assessments were intended for "decontamination and decommissioning of the Department's gaseous diffusion [uranium] enrichment facilities," see 42 U.S.C. 2297g-1(g) (referring to utilities' right to pass-through to con-

EPACT's retroactive assessments are inconsistent with *Eastern Enterprises*, the plurality opinion in that case expressed no doubt that receipt of a benefit is a rational basis for the imposition of retroactive liability to address a societal problem associated with that benefit. See 524 U.S. at 536 (opinion of O'Connor, J.) (noting that Congress could legitimately have made miners' former employers liable for the miners' employment-related health-care costs, given that employers benefited from miners' labor; citing *Turner Elkhorn*).

c. At bottom, petitioners' substantive due process challenge to the EPACT assessments can be reduced to their contention that, because the DOE enrichment plants were already contaminated from prior military uses before the government began offering commercial enrichment services, the government must bear all the cost of remediation—even though petitioners also concede that enriching the utilities' uranium caused the same kind of contamination as did enrichment for military purposes (or would have caused the same kind of contamination, had the facilities not already been contaminated). See SMUD Pet. 22a & n.2. That argument is unavailing.

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sumers "[a]ny special assessment levied under this section * * * for decontamination and decommissioning"), and the subchapter of EPACT containing the special-assessment provision also defined the term "decontamination and decommissioning" to mean activities "undertaken to decontaminate and decommission inactive uranium enrichment facilities." See EPACT § 901, 106 Stat. 2923 (adding 42 U.S.C. 2297(6) (1994), repealed by Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. III, ch. 1, subch. A, § 3116(a)(1), 110 Stat. 1321-349). Although the Fund established by EPACT is also the source of monies used to clean up thorium and uranium processing sites, see 42 U.S.C. 2296a-2(b), the monies for cleaning up thorium and uranium processing sites are to be drawn from the government's contributions to the Fund, see 42 U.S.C. 2296a-1; 42 U.S.C. 2296a-2 (1994 & Supp. V 1999), and the utilities have not been assessed for that purpose.

Nothing in the Due Process Clause required Congress to assign financial responsibility for clean-up costs only to the *first* user whose services contributed to the contamination of an enrichment facility, when all subsequent users of the facility received the same services that cause that kind of contamination. Congress could perhaps have adopted a rule that the first user of DOE's enrichment services should pay for the entire cost of decontamination, but it determined instead that the costs should be borne collectively by all of those entities whose uses of the enrichment services would have contributed to the contamination of the enrichment facilities, in proportion to the benefit the entity received from those enrichment services. "It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the *entire class* of persons that Congress rationally believes should bear them." *Sperry*, 493 U.S. at 65 (emphasis added).

Indeed, petitioners are arguably required to pay considerably less than their fair share of the decontamination costs, for responsibility for 68 percent of those costs is assigned by EPACT to the government. As the court of appeals noted, "these utilities are obligated to pay only about a third of the remediation costs, even though evidence was presented [to Congress] that the 'production from these plants ha[d] been divided almost evenly between the government and commercial sectors.'" SMUD Pet. App. 49a (quoting H.R. Rep. No. 474, *supra*, Pt. 1, at 144).[12]

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[12] Petitioner MYAP argues (MYAP Pet. 25 n.17) that the government has not in fact contributed its allocated share to EPACT, since annual appropriations to the Fund in some years have been somewhat less than the amounts authorized by EPACT. In fact, we have been informed by DOE that the government's total contributions to the Fund through Fiscal Year 2001 amount to approximately $2.684 billion, whereas amounts contributed by the utilities pursuant to the EPACT assessments amount to approximately $1.482 billion. Thus, the government has contributed

Where the cost allocation scheme chosen by Congress is rational, courts are not empowered to engage in an evidentiary fact-finding inquiry, as demanded by petitioners, to determine whether the allocation of costs should or could be different. Whether some other approach would have been wiser is not a question of constitutional dimension, but is rather a policy question for Congress, not the courts. See *Turner Elkhorn*, 428 U.S. at 19 ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.").

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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considerably more than half of the amount in the Fund, even though Congress understood that about half of DOE's enrichment services were attributable to the commercial sector.